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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER, [redacted] TERM
1969

NO. [redacted] 89

LESTER NEHRING,

Petitioner,

v.

EMPRESA LINEAS MARITIMAS ARGENTINAS,

Respondent,

v.

STRACHAN SHIPPING COMPANY,

Third Party
Respondent

PETITION FOR WRIT OF CERTIORARI TO REVIEW DECISION OF THE FIFTH CIRCUIT COURT OF APPEALS

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER, 1968, TERM

NO. ____

LESTER NEHRING,

Petitioner,

v.

EMPRESA LINEAS MARITIMAS ARGENTINAS,

Respondent,

v.

STRACHAN SHIPPING COMPANY,

Third Party Respondent

PETITION FOR WRIT OF CERTIORARI TO REVIEW DECISION OF THE FIFTH CIRCUIT COURT OF APPEALS

LESTER NEHRING, Petitioner, petitions that writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Fifth Circuit entered in the above entitled cause on the 7th

day of October, 1968, and its Order refusing Petition for Rehearing dated December 5, 1968.

REFERENCE TO REPORTS BELOW

The opinion of the Circuit Court of Appeals for the Fifth Circuit is reported at 401 F_2 767 in Appendix A. The order overruling Petition for Rehearing, not published, appears in Appendix B. There was no written opinion by the District Court.

GROUNDS ON WHICH JURISDICTION IS INVOKED

The date of the judgment of the Circuit Court of Appeals sought to be reviewed is October 7, 1968 - entered the same date. Petition for Rehearing was denied on December 5, 1968. This Court on February 25, 1969, extended the time for filing petition for writ of certiorari to and including April 4, 1969; thereafter on April 7, 1969, the time for filing petition was further extended to and including April 24, 1969; no terms were imposed on the orders.

The statutory provisions believed to confer jurisdiction on this Court to review the judgment or decree in question by writ of certiorari are 28 U.S.C. 1254(1), and is filed within the time allotted by 28 U.S.C. 2101(c).

QUESTIONS PRESENTED

1. Did Court of Appeals err in holding

that it did not constitute prejudicial error for trial court to deny alternative motions by plaintiff longshoreman suing vessel owner on personal injury claim arising from asserted unseaworthiness of vessel and/or negligence of vessel owner where the vessel owner in the same suit has been allowed to implead the plaintiffs stevedore employer under Rule 14(a) FRCP for indemnity, to either allow plaintiff the same total number of peremptory challenges to the jury panel allowed respondents or sever the indemnity action from the trial of his action against the vessel owner.

2. Did the Circuit Court of Appeals err in holding that the trial court did not commit prejudicial error in refusing to give plaintiff's requested instructions, or to charge the jury on what it would consider an injury to be, where the evidence was susceptible of different interpretations and the jury was required to answer as the first interrogatory, submitted under Rule 49(a) FRCP, "Did the plaintiff, Lester Nehring, sustain an injury while working aboard the Rio Bermejo on or about January 9, 1964?"

STATUTES AND RULES INVOLVED

1. 28 U.S.C. 1870 - Appendix G.
2. FRCP 20 - Appendix I.
3. FRCP 42(b) - Appendix H.
4. FRCP 14(a) - Appendix J.
5. FRCP 49(a) - Appendix K.

STATEMENT OF CASE

Petitioner Nehring, plaintiff in the trial court, who had previously sustained injury to the lumbar area of his back resulting in spinal surgery, performed by the only physician (an orthopedic specialist) testifying in the case, and who operated on him for the injuries alleged as the basis of this suit, brought suit against Empresa Lineas Maritimas Argentinas by reason of an injury sustained on the 9th day of January 1964. Jurisdiction was based upon diversity of citizenship and the amount of controversy (28 U.S.C. 1332) P1T. Respondent Empresa Lineas Maritimas Argentinas filed third party complaint P17-25T against impleaded respondent Strachan Shipping Company (petitioners employer) alleging that any injuries sustained by petitioner resulted from breach of warranty of workmanlike service aboard such vessel. Prior to the selection of the jury, petitioner moved the Court alternatively to allow the petitioner the same number of peremptory challenges to the jury panel as was allowed respondent and impleaded respondent collectively or alternatively for separate trial to sever the matter of indemnity. See pages 3-5 of the record. The Court refused the motion, Appendix L. The motion was refused and each respondent given three challenges, instructions were given respondents on the trial. Only one physician was called to testify, this being an orthopedic surgeon who had performed surgery to the lumbar area of

petitioners back prior to the injury made the basis of this suit and who also operated on him for the injuries alleged and who testified on cross-examination herein that petitioners back problems had begun in 1960, prior to the injury made the basis of this suit, and he was unable to determine whether the petitioner had at the time of the injury at issue sustained a new fracture of the previous operative site or had a psuedo-arthrosis. See Vol. II P230-233, Appendix M. The case was submitted to the jury on special interrogatories under Rule 49(a) FRCP with the first interrogatory inquiring if petitioner sustained an injury. Vol. I P71 Transcript of Record, Appendix N.

Petitioner requested the Court to instruct the jury as to what it would consider an injury to be. Requested instruction P59R, appears Appendix O. Petitioner essentially requested the Court to charge that any worsening of petitioner's condition as a result of the occurrence made the basis of this suit would be regarded in law as an injury. Petitioner excepted P624-5R Vol. III, Appendix P and the Court refused to charge. P625 supra and Appendix P.

The jury returned a verdict finding a negative answer as to the interrogatory no. 1. Petitioner appealed, assigning as error the refusal to allow petitioner an equal number of peremptory challenges to the jury panel and the Courts refusal to give the requested instructions as to

what the jury would regard an injury to be for the purpose of answering the first interrogatory or to charge on this matter. The Circuit Court of Appeals denied petitioners appeal, holding there was no merit as to his contention that he should be given an equal total number of peremptory challenges to the jury panel as allowed respondents and that the jury needed no instructions under the facts of this case as to what constituted an injury since respondents denied the incident at issue occurred — even though the interrogatory asked not about the occurrence of the incident, but if petitioner sustained an injury, insofar as is material.

Petitioner being an employee of third party respondent Strachan Shipping Company, in the interim, pursued his claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901, et seq. The Deputy Commissioner found that the alleged injury occurred, that he was permanently partially disabled and awarded compensation. Respondent Strachan appealed; the District Court affirmed, and upon appeal the Circuit Court of Appeals 406 F_2 521 affirmed, Appendix F.

Strachan Shipping Company, respondent herein and as petitioner in cause no. 1254 on April 11, 1969, filed petition for writ of certiorari requesting this Court to review the action of the Circuit Court of Appeals in upholding the Deputy Commissioner's refusal to apply the doctrine of collateral estoppel to

the issue of whether petitioner sustained an injury on the occasion in question.

REASONS FOR GRANTING WRIT

First Question

This question involves an important question of federal law which is believed to be decided contrary to decisions of this court; involves the right to peremptorily challenge members of the jury panel and thereby select a fair and impartial jury; that the question should be decided by this Court in view of previous abuse of a similar ruling by a court in the Southern District of Texas and the constantly recurring problem as indicated by the courts ruling on the matter and counsel's comments.

ARGUMENT

First Question

This Court in Weyerhauser S.S. Co. v. Nacirema Operating Co. 78 S. Ct. 438, P441; 355 U.S. 563, 568 indicated clearly that the trial of the indemnity action in such a case as this to the same jury, was not to be at the prejudice of the longshoreman, "— all fact issues involved in the third party action should have been submitted to the jury after the verdict in the main case," citing the problems of different duties.

This Court in Swain v. State of Alabama 85S. Ct. 824, P835; 380 U.S. 202, P. 219 points out the importance of the exercise of peremptory challenges and holds, "— The denial or impairment of the right is reversible error without a showing of prejudice.", citing cases including the Civil case of Gulf, Colorado Santa Fe R. Co. v. Shane 157 U.S. 348, 15S. Ct. 641, 39L Ed. 727. The peremptory is a vital part of dispensing justice under our system. "— to perform its high function in the best way justice must satisfy the appearance of justice." See Swain supra page cited —citing in re: Murchison 349 U.S. 133, 136; 75S. Ct. 623, 625; 99 L. Ed. 942.

The allowance of peremptory challenges as was done in this case takes an added significance, when one considers Rogers v. Devries & Co., 236 F. Supp. 110. In Rogers, supra, the trial court gave essentially the same instructions (except collusion) as was given in this case; however, because of peculiar circumstances existing in that case it was possible to offer proof that defendant and third party defendant in such case deviously avoided complying with the Court's ruling, and upon being confronted with proof that actuarially the odds were 40,000 to 1 that there had been a violation of the Court's Order (because of more than one jury and alternate juror in each case being selected at the same time, it was possible to make this proof which does not appear in the opinion but which was reported and could be trans-

cribed and brought forward if denied); proof of this fact, if it occurred, is not susceptible of being made in this case by reason of only one jury being selected. The defendant and third party defendant in such case then admitted to the Court what had taken place. Such instruction by the Court as was given has not been effective prior to this case, see Rogers, supra; such a procedure as was followed here does not leave the appearance of justice — especially in the eyes of the lay litigant for whom the courts exist.

No one can quarrel with the courts saving time by trying both cases together, except if it results in prejudice to a litigant. The petitioner, plaintiff in the trial court, was faced with two adversaries, each intent upon defeating him, who if unsuccessful could then try to blame the other, who were given twice the total peremptory challenges as was given him; the very number of challenges allowed the defense impaired his right to select a fair jury and was thereby a violation of his rights, see Swain supra.

The trial court could have avoided this prejudice by allowing a separate trial of the indemnity action under Rule 20 FRCP; granting severance or separate trial under Rule 14(a) FRCP or by ordering separate trial under Rule 42(b) FRCP or by limiting respondents to a total of three peremptory challenges under 28 U.S.C. 1870, Appendix G, or by allowing each of respondents three

peremptory challenges to be exercised jointly or separately as they desired and allowing petitioner six peremptory challenges.

REASONS FOR GRANTING WRIT

Second Question

The holding of the Court of Appeals is believed to be contrary to this Courts previous decision, and/or has sanctioned the trial courts failure to give necessary instructions to the jury under Rule 49(a) FRCP and is believed to be contrary to the decisions of another Court of Appeals and is contrary to its own decisions as to giving of instructions.

ARGUMENT

Second Question

The decision of the Court of Appeals is believed to be contrary to this Courts decision in Baltimore and South Carolina Line v. Redman 55 S. Ct. 890, 891; 295 U.S. 654, 657. The interrogatory did not inquire whether the incident made the basis of this suit occurred as the Court of Appeals decision seems to hold that the inquiry was, but whether or not petitioner sustained injury. The word injury is described as meaning a number of things in Websters Dictionary; approximately 60 pages of headnotes appear in words and phrases defining injury under different conditions. The doctor who operated could

not tell if there was a new fracture of the previous operative site or not. Without an instruction to the jury defining what they would regard an injury to be under the facts of this case, we have no way of knowing whether they were considering the incident as having occurred or not occurred when answering the crucial interrogatory or whether they considered that the petitioner must have proved a fracture of the preexisting operative site; if it was the latter, since the burden of proof was upon the petitioner the jury would obviously return a negative answer, when the operating surgeon could not answer the question of what had happened.

The Seventh Circuit in Pellegrini v. Chicago and Great Western Railway Company 319 F_2 447 held that where the evidence would support a verdict for either side, that erroneous instructions required a reversal. The Fifth Court of Appeals in Marshall v. Isthmian Lines, Inc. 334 F_2 136, P137-138 reversed for failure to instruct the jury as to plaintiffs theory of case.

Rule 49(a), Appendix K, authorizing special verdicts, requires the submission of necessary instructions which were not given, but requested. The Court of Appeals has equated the word injury in the interrogatory to occurrence of the incident alleged by petitioner and found by the Deputy Commissioner in a different proceeding, to have occurred. The argument of counsel as to its occurrence or non-occurrence does not

obviate the necessity for necessary instructions.

WHEREFORE, premises considered, petitioner prays that this petition be granted and upon review the cause be reversed with instructions to the Courts below in line with this petition.

Respectfully submitted,

(ORIGINAL SIGNED) W. JILES ROBERTS

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Houston, Texas 77002
223-4601

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Petition for Writ of Certiorari has been served upon each of the following: Royston, Rayzor & Cook, Mr. Carl O. Bue, Jr. of counsel, 877 San Jacinto Building, Houston, Texas 77002 attorneys for Empresa Lineas Maritimas Argentinas, respondent; and upon Eikel & Goller, Mr. Theodore Goller of counsel, 205 Oil & Gas Building, Houston, Texas 77002, attorneys for Strachan Shipping Company, third party respondent, by depositing in a United States Post Office or mailbox the same to each of them, United States Mail, postage prepaid, properly addressed to

each of them at their respective Post Office addresses, prior to forwarding this Petition for Writ of Certiorari to the Clerk of the Supreme Court for filing this 24th day of April, 1969.

(ORIGINAL SIGNED) W. JILES ROBERTS

W. JILES ROBERTS

APPENDIX A

(Caption Omitted)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Appeal from the United States District Court for the Southern District of Texas

(October 7, 1968)

Before BELL and SIMPSON, Circuit Judges and ROBERTS, District Judge.

PER CURIAM: Appellant Nehring allegedly sustained injuries on January 9, 1964, while working as a longshoreman on the S/S RIO BERMEJO, owned and operated by Appellee Empresa Lineas Maritimas Argentinas. At the time of the alleged accident, appellant was an employee of Strachan Shipping Company, an independent contracting stevedoring company. Appellant brought suit against the shipowner for negligence and vessel unseaworthiness. The shipowner subsequently impleaded the stevedore employer on the theory that, if the ship was to be cast in liability which it denied, such resulting liability stemmed from the stevedore's breach of its warranty of workmanlike service owed to the vessel in the performance of its operations.

Prior to the commencement of the jury trial, appellant moved the trial court to equalize the peremptory challenges, i.e. to give the appellant the same total number of peremptory challenges that

appellees were given. If not given equal challenges, appellant alternatively asked that the shipowner's third party action against the stevedore be severed. Appellant's motion was denied; appellant was given three peremptory challenges; and appellees were each allowed three challenges to be exercised without conferring and with no collusion between them. The appellant claims this was an abuse of the discretion given the trial court in 28 U.S.C. 1870 (1964). There is no merit to this contention.

Following the presentation of the evidence and arguments, the court submitted the case to the jury upon special interrogatories. The first interrogatory read: "Did the plaintiff, Lester Nehring, sustain an injury while working aboard the RIO BERMEJO on or about January 9, 1964?" The jury answered "no" and obviously did not have to go further. Appellant's second contention on appeal is that the trial court erred in not defining, as requested, "injury" as an aggravation of a pre-existing condition, for it was this type of injury about which appellant offered proof. The argument is that the jury decided there was "no injury" without understanding what "injury" meant.

This confuses the purpose of interrogatory number one, as a close reading of the record will reflect. The theory of the defense was that there was never any accident or event or occurrence as and when alleged by appellant: the

shipowner's trial counsel said in his opening argument "We deny that this man sustained an accident on this ship." (R. 18). During the trial of the case, it was to prove or disprove the alleged accident that most of the evidence was offered; and this question was reemphasized during closing arguments of counsel, particularly by appellees. (R. 519). Thus, the crucial issue joined and argued in the trial below was whether or not there was an incident as alleged by appellant.

It was to present this issue to the jury that the trial judge submitted interrogatory number one. (R. 448); and to understand and answer it the jury needed no definition of injury. Extent or type of injury was not the inquiry. There being no need to define injury, this court finds that the jury was fairly instructed.

AFFIRMED.

APPENDIX B

(Caption Omitted)

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Appeal from the United States District Court for the Southern District of Texas

(October 7, 1968)

Before BELL and SIMPSON, Circuit Judges and ROBERTS, District Judge.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, Lester Nehring, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

Issued as Mandate:

APPENDIX C

(Caption Omitted)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Appeal from the United States District Court for the Southern District of Texas

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(December 5, 1968)

ON PETITION FOR REHEARING

Before BELL and SIMPSON, Circuit Judges and ROBERTS, District Judge.

PER CURIAM: It is ORDERED that the petition for rehearing in the above entitled and numbered cause be, and the same is, hereby

DENIED.

APPENDIX D

(Caption Omitted)

SUPREME COURT OF THE UNITED STATES
No. ____, October Term, 1968

ORDER EXTENDING TIME TO FILE PETITION
FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above entitled cause be, and the same is hereby, extended to and including April 4, 1969.

/s/ HUGO L. BLACK
Associate Justice of
the Supreme Court of
the United States

Dated this 25th day
of February, 1969.

APPENDIX E

(Caption Omitted)

SUPREME COURT OF THE UNITED STATES
No. ____, October Term, 1968

ORDER EXTENDING TIME TO FILE PETITION
FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above entitled cause be, and the same is hereby, further extended to and including April 24, 1969.

/s/ HUGO L. BLACK
Associate Justice of
the Supreme Court of
the United States

Dated this 7th day
of April, 1969.

APPENDIX F

(Caption Omitted)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Appeal from the United States District Court for the Southern District of Texas

(January 13, 1969)

Before JONES and COLEMAN, Circuit Judges, and CHOATE, District Judge.

PER CURIAM: In January, 1964, Lester Nehring, an employee of Strachan Shipping Company, was allegedly injured while working on board the S/S RIO BERMEJO. He instituted a third party suit against the owner of the vessel to recover for the injuries he sustained. The owner in turn impleaded Nehring's employer, Strachan Shipping Company, for indemnity. The jury found that Nehring did not sustain an injury while working on board the vessel and denied recovery.

Thereafter, Nehring filed a claim before the Deputy Commissioner, pursuant to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C., 901, et seq. The Deputy Commissioner held a formal hearing and, determining that Nehring did in fact suffer personal injuries while working on board the S/S RIO BERMEJO, awarded compensation.

Strachan brought action to set aside the award. The District Court granted summary judgment in favor of the Deputy Commissioner and affirmed the award.

The question is: Did the jury finding that Nehring was not injured while on board the vessel collaterally estop the Deputy Commissioner from deciding to the contrary?

The issue is identical to that presented in Young & Co. v. Shea, 5 Cir., 1968, 397 F.2d 185, in which we held that the Deputy Commissioner was not estopped. That precedent is controlling here.

See also Watson v. Gulf Stevedore Corp., 5 Cir., 1968, 400 F.2d 649, and Goins v. Noble Drilling Corp., 5 Cir., 1968, 397 F.2d 392; petition for rehearing in Young and in Watson denied December 9, 1968, ——F.2d ——.

We again point out that the proceeding before the Deputy Commissioner is quite distinct from the ordinary civil suit before a jury. Unlike a judge in a civil suit, the Deputy Commissioner is not bound by common law or statutory rules of evidence or formal rules of procedure, 33 U.S.C., 923. In addition, certain presumptions, not elsewhere indulged, are recognized in a hearing brought in accordance with the Longshoremen's and Harbor Workers' Compensation Act. 33 U.S.C., 920.

Finally, and most significantly, the burden of proof for the petitioner in a compensation hearing is less stringent than in a civil suit. Whereas, in a civil suit the petitioner must prove his case by a preponderance of the evidence,

in a hearing before the Commissioner all doubtful questions of fact are to be resolved in favor of the injured employee. See J. V. Vozzolo, Inc. v. Britton, D. C. Cir., 1967, 377 F.2d 144, 147; Friend v. Britton, D. C. Cir., 1955, 220 F.2d 820. The legislative history of the Administrative Procedure Act, 5 U.S.C., 500, et seq., cited by the appellant, is not deemed to be to the contrary.

The doctrine of collateral estoppel is inapplicable to the situation here presented. The judgment of the District Court is

AFFIRMED.

APPENDIX G

CHALLENGES
(28 U.S.C., 1870)

In civil cases, each party shall be entitled to three peremptory challenges. Several defendants or several plaintiffs may be considered as a single party for the purposes of making challenges, or the court may allow additional peremptory challenges and permit them to be exercised separately or jointly.

All challenges for cause or favor, whether to the array or panel or to individual jurors, shall be determined by the court. June 25, 1948, c. 646, 62 Stat. 953; Sept. 16, 1959, Pub. L. 86-282, 73 Stat. 565.

APPENDIX H

CONSOLIDATION; SEPARATE TRIALS (Rule 42(b) FRCP)

(b) Separate Trials. The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States. As amended Feb. 28, 1966, eff. July 1, 1966.

APPENDIX I

PERMISSIVE JOINDER OF PARTIES
(Rule 20 FRCP)

(a) Permissive Joinder. All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right of relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective liabilities.

(b) Separate Trials. The court may make such orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party against whom he asserts no claim and who asserts no claim against him, and may order separate trials or make other orders to prevent delay or prejudice.

APPENDIX J

THIRD-PARTY PRACTICE
(Rule 14(a) FRCP)

(a) When Defendant may Bring in Third Party. At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. The third-party plaintiff need not obtain leave to make the service if he files the third-party complaint not later than 10 days after he serves his original answer. Otherwise he must obtain leave on motion upon notice to all parties to the action. The person served with the summons and third-party complaint, hereinafter called the third-party defendant, shall make his defenses to the third-party plaintiff's claim as provided in Rule 12 and his counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is

the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses as provided in Rule 12 and his counterclaims and cross-claims as provided in Rule 13. Any party may move to strike the third-party claim, or for its severance or separate trial. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him for all or part of the claim made in the action against the third-party defendant. The third-party complaint, if within the admiralty and maritime jurisdiction, may be in rem against a vessel, cargo, or other property subject to admiralty or maritime process in rem, in which case references to the third-party plaintiff or defendant include, where appropriate, the claimant of the property arrested. As amended Dec. 27, 1946, eff. March 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966.

APPENDIX K

SPECIAL VERDICTS AND INTERROGATORIES (Rule 49(a) FRCP)

(a) Special Verdicts. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment of the special verdict.

APPENDIX L

PROCEEDINGS
(February 22, 1967)

MR. ROBERTS: We have motions to be made out of the presence of the jury, Your Honor, in the Nehring case.

Your Honor, we move the Court number one, to either equalize the jury strikes that are afforded plaintiff and third party defendant so that the plaintiff would have an equal amount of strikes, the defendant and third party defendant, that they be limited to a total of three strikes and that tha third party action be severed, and in connection with this we say that we would be prejudiced if we are not given equal strikes.

THE COURT: Yes. I hear that motion every time you have a case in this court.

MR. ROBERTS: Yes, Your Honor, and I think it is a valid motion.

THE COURT: I have never thought that it was and I have never sustained it and I think the court should follow some consistency. I will be consistent and deny your motion.

I will instruct defendant and third party defendant that they will exercise their challenges independently. There will be no conferring or collusion between them, but if you strike the same ones, why that is the way it happens. The Defendant will have three challenges

and the third party defendant will have three challenges, and they will be exercised independently without knowledge of what the other party is doing.

MR. THOMPSON: If Your Honor please: I have understood clearly the Court's instruction and I want you to know as an officer of the Court that I have conferred not a bit with Mr. Goller or neither has anybody. I just wanted Mr. Roberts to know and I wanted to say it in open Court that there has been no predetermination that I am going to strike every fifth one or every sixth one. We haven't talked about it at all and don't intend to.

THE COURT: I don't know how you could predetermine that when the list hasn't been prepared yet.

APPENDIX M

Q Now, I showed you these to get you to comment about them along the line that you were talking about when I interrupted you. The general size of this man's problems began in 1960, didn't they?

A Concerning his back, in my opinion, yes, sir.

Q Now then, without going over these again, I will tell you that they show less time off work following this '64 injury than following the 1960 injury.

A Yes, sir.

Q Now, I recognize that the operations were identical, weren't they?

A No, not quite.

Q Well, removal of herniated disk material at the L-4, L-5 level, and a fusion in '61; a repair in '64.

A The first operation was at two levels and the second was only at one. It was a re-fusion.

Q The laminectomy phase of the operation in '64 was not as extensive as it was in '61 then?

A No, sir. Most of the disk was removed in '61. You don't ever get all of it out.

Q Besides, he had two levels before and only one level the second time?

A Yes, sir.

Q So you are only building the one-story house in '64 and building a two-story house in '60?

A If you want to put it that way, yes, sir.

Q That is something I can understand.

You spoke of a fracture of the bone that had been utilized for the fusion. Part of it was intact, L-4, L-5?

A That is one level that was intact, yes, sir.

Q And it was the lower level between L-5 and S-1. Now, are you talking about a psuedoarthrosis or a fracture?

A I don't know.

Q Well, I just didn't want the jury to get the idea that some bone had been busted back there.

A It may have or it may be that the fusion never matured at the 4,5 level. I don't know.

Q There is some legitimate question about it, even by yourself. You are not certain.

A That is correct.

APPENDIX N

VERDICTS OF THE JURY IN ANSWER TO INTERROGATORIES PROPOUNDED TO IT BY THE COURT UNDER THE PROVISIONS OF RULE 49(a) OF THE FEDERAL RULES OF CIVIL PROCEDURE

Interrogatory No. 1:

Did the plaintiff, Lester Nehring, sustain an injury while working aboard the Rio Bermejo on or about January 9, 1964?

You will answer "Yes" or "No".

Answer: No

If you answer Interrogatory No. 1 in the negative, you need not answer any of the following interrogatories, but if you answer Interrogatory No. 1 in the affirmative, the following interrogatories will be answered.

APPENDIX O

ADDITIONAL REQUESTED INSTRUCTION

TO THE HONORABLE JUDGE OF SAID COURT:

You are instructed that if you find from a preponderance of the evidence that the condition of plaintiff's back before the occurrence in question did not cause him to experience disability, pain and/or suffering to the extent, if any, that you find from a preponderance of the evidence that he has experienced following the occurrence, if any, in question, and if you find from a preponderance of the evidence that the occurrence in question, if any, caused him to experience such greater disability, pain and/or suffering than he was experiencing immediately prior to the occurrence in question, if any, then the occurrence in question, if any, shall be considered by you as an injury and as the proximate cause of such additional disability, pain and/or suffering which you find from a preponderance of the evidence that he has and/or will in reasonable probability experience.

APPENDIX P

MR. ROBERTS: With reference to the instructions now, not the interrogatories. We except to the Court's not giving requested instructions 3, 4 and 5 and also we except to the failure to give the additional requested instructions dealing with definition of what would constitute an injury under the circumstances of the case.

We further renew our objection to the submission both of the primary and the indemnity actions together.

MR. THOMPSON: No objections, Your Honor, except those I assume are automatic based on my requested instructions or definitions which are not expressly included in the charge.

THE COURT: Everything not given is refused. I think it would be confusing to further instruct them.

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IN THE

Supreme Court of the United States

October Term, [redacted] 1969

LESTER NEHRING, *Petitioner*

-versus-

EMPRESA LINEAS MARITIMAS ARGENTINAS, ET AL., *Respondents*

BRIEF OF RESPONDENT STRACHAN SHIPPING COMPANY IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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NO. 1311

IN THE

Supreme Court of the United States

October Term, 1968

LESTER NEHRING, *Petitioner*

-versus-

EMPRESA LINEAS MARITIMAS ARGENTINAS, ET AL., *Respondents*

BRIEF OF RESPONDENT STRACHAN SHIPPING COMPANY IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE THE CHIEF JUSTICE, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Respondent Strachan Shipping Company, the stevedoring company engaged by the owner of the M/V RIO BERMEJO, respondent Empresa Lineas Maritimas Argentinas, to discharge cargo from that vessel and the employer of petitioner Nehring opposes the petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit in this cause.

OPINIONS IN THE COURTS BELOW

The opinion of the Court of Appeals is reported at 401 F.2d 767. The judgment of the Trial Court was based upon a jury verdict, and therefore no written opinion was rendered by that court.

STATUTES AND RULES INVOLVED

28 U.S.C. §1870:

> "In civil cases, each party shall be entitled to three peremptory challenges. Several defendants or several plaintiffs may be considered as a single party for the purposes of making challenges, or the court may allow additional peremptory challenges and permit them to be exercised separately or jointly.
>
> "All challenges for cause or favor, whether to the array or panel or to individual jurors, shall be determined by the court. June 25, 1948, c. 646, 62 Stat. 953; Sept. 16, 1959, Pub.L. 86-282, 73 Stat. 565."

Federal Rules of Civil Procedure:

> "Rule 20. Permissive Joinder of Parties
>
> "(b) Separate Trials. The court may make such orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party against whom he asserts no claim and who asserts no claim against him, and may order separate trials or make other orders to prevent delay or prejudice."
>
> "Rule 42. Consolidation; Separate Trials
>
> "(b) Separate Trials. The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and econ-

omy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States. As amended Feb. 28, 1966, eff. July 1, 1966."

"Rule 49. Special Verdicts and Interrogatories

"(a) Special Verdicts. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict."

QUESTIONS PRESENTED

1.

Whether it was error for the trial court to refuse plaintiff more than the three peremptory juror challenges

accorded each party by statute and to decline to treat the other two parties as one and allow the two only three peremptory challenges, contrary to statute.

2.

Whether the trial court abused its discretion in declining to order a separate trial between defendant and the impleaded third-party defendant, where the only ground urged by plaintiff for such separate trial was that he desired the court to allow peremptory juror challenges contrary to statute.

3.

Whether it was error to refuse a verbose and confusing definition of the common word "injury", where the trial court gave a full and fair charge on the entire case and the jury found in response to a special interrogatory part of such charge that plaintiff sustained no injury.

STATEMENT OF THE CASE

Petitioner brought this suit against respondent shipowner-operator Empresa Lineas Maritimas Argentinas to recover damages for an injury he claimed he sustained while employed by the stevedore Strachan Shipping Company as a longshoreman at work on the vessel. The usual allegations that the shipowner was negligent and its vessel unseaworthy were made.

The shipowner thereafter impleaded the stevedore-employer. It denied its own liability and the allegations made against it but sought alternatively indemnity from the stevedore if the jury should find contrary to its answer

that the plaintiff was injured while aboard its vessel, such indemnity being sought on the ground that any injury would have been caused by breach of the stevedore's warranty of workmanlike performance. Costs and attorneys fees were sought also.

The principal contention of defendant, and of the impleaded third-party defendant Strachan, was that the plaintiff sustained no injury on the vessel. Much evidence was introduced to support this contention. The trial court gave a detailed and comprehensive charge (printed hereinbelow as Appendix A) and submitted special interrogatories to the jury in accordance with Rule 49(a), F.R.C.P. The first interrogatory inquired whether petitioner sustained "an injury while working aboard the RIO BERMEJO on or about January 9, 1964". The jury answered this "No". R. 71. Final judgment was thereafter entered denying plaintiff petitioner's claim against the shipowner and denying the shipowner's claim over against the stevedore Strachan. R.77.

Petitioner contended on his appeal to the Court of Appeals for the Fifth Circuit that the trial judge erred in declining to define for the jury the term "injury", used in the first special interrogatory, and in refusing to allow him six peremptory challenges or if not so allowed to allow the defendant and impleaded defendant together only three, the same as plaintiff, or for a separate trial between the two defendants if plaintiff's motion on challenges was not granted. The Court of Appeals, in a per curiam opinion, held that there was no merit to either contention and unanimously affirmed the judgment of the trial court. Petitioner's motion for rehearing was denied.

ARGUMENT

a. There Was No Error In The Court's Allowing Each Party The Three Peremptory Challenges To Which They Were Entitled By Statute.

The statute, 28 U.S.C. §1870, explicitly provides that "each party shall be entitled to three peremptory challenges". Here certainly there were three separate parties, and while to the plaintiff the defendant shipowner and third-party defendant stevedore may have appeared as a common adversary, particularly since each vigorously contended plaintiff sustained no injury, certainly as between themselves the two were clearly adversaries. As to these two parties, for the Court to have held they were legally one party would have been to deny to each the three challenges granted them by statute and would have been grossly unfair to them vis-a-vis each other, and it can hardly be argued to the contrary.

Indeed it appears plaintiff realized this was the case, for alternatively to his request for unfair treatment with respect to challenges between the defendants he requested for himself preferential treatment in the form of three additional challenges, a request plainly contrary to the explicit language of the statute which allows one party only three peremptory challenges.

There can be no reasonable construction of the statute to base a contention that a single party, as of course the plaintiff was here, shall have *six* peremptory challenges!

And as is perfectly clear in these cases, the rights and contentions of the defendant and third-party defendant vis-a-vis each other would make it a plain abuse of judicial discretion to treat them as one and on such basis allow these separate parties only three challenges to be

jointly exercised. Which party would be granted the three in case they could not agree as to the exercise of their thus imposed "joint rights"?

The plaintiff cites no authority for his attempt to obtain twice as many peremptory challenges as the statute provides he is entitled to be allowed, and it would be plainly unfair to give him such an advantage in the selection of a jury as plaintiff here contends he should have received.

b. There Can Be No Doubt The Ends Of Justice Were Served By Refusing Separate Trials.

This Court has clearly decided that the third-party procedure provided for by Rule 14(a), F.R.C.P., is intended to facilitate the trial of causes where there are multiple claims, *United States v. Yellow Cab Company*, 340 U.S. 543, 556, 71 S.Ct. 399, 407 (1951). Particularly is this the case where the evidence would be essentially the same and delay and expense can be avoided by a single trial. *Dery v. Wyer*, 265 F.2d 804, 806-807 (2 Cir. 1959); *Falls Industries, Inc. v. Consolidated Chemical Industries, Inc., Et Al.*, 258 F.2d 277, 283 (5 Cir. 1958).

Here, even under his distorted interpretation of this Court's decision in *Weyerhaeuser Steamship Co. v. Nacirema Operating Co.*, 355 U.S. 563, 78 S.Ct. 438 (1958), the plaintiff did not contend below and does not here contend that the single trial here did not avoid delay and expense: Such a contention would have been manifestly absurd.

What he asked for alternatively below and does contend here is that if he were not to be allowed to secure an unfair advantage by being given twice the peremptory challenges accorded him by statute, or an equally unfair

advantage by denying to one of the other parties the three challenges the statute granted it, then there should have been separate trials.

There is no authority for such a proposal, and the suggestion that the trial court abused the discretion given it by the Rules in rejecting plaintiff's alternative proposal is plainly completely without any reasonable or even argumentative ground.

c. The Charge To The Jury Was Full And Fair, And The Trial Court Was Clearly Right In Declining To Give The Verbose And Confusing Requested Definition Of The Common Term "Injury".

Printed as an appendix hereto is the charge of the trial court, which even a cursory reading shows was just and fair to all of the parties.

A trial court is of course under no greater duty than to give a full and fair charge, such as was here given. *The Indianapolis & St. Louis Railroad Company v. Horst,* 93 U.S. 291, 23 L.Ed. 898, 899 (1876); *Southern Railway Company v. Shealey,* 382 F.2d 752, 755 (5 Cir. 1967).

On the other hand, it is equally plainly settled the Court is under no duty to give an instruction (or definition) not entirely correct, or so framed as to be confusing or to be misunderstood. *Burns v. Travelers Insurance Company,* 344 F.2d 70, 74 (5 Cir. 1965); *Cherry v. Stedman,* 259 F.2d 774, 777-778 (8 Cir. 1958).

And, it is with respect submitted, there can be no doubt that the definition of the word "injury" requested could have only hopelessly confused a jury asked simply whether

the plaintiff received an injury, the real issue in the case. As the Court of Appeals has here pointed out:

> "It was to present this issue to the jury that the trial judge submitted interrogatory number one. (R. 448); and to understand and answer it the jury needed no definition of injury. Extent or type of injury was not the inquiry. There being no need to define injury, this Court finds that the jury was fairly instructed."

CONCLUSION

The issues here sought reviewed involve no important questions of law, either statutory or decisional, and no conflicts between decisions of Courts of Appeal. In reality review is sought of rulings plainly right, which certainly could not be deemed abuses of a trial judge's discretion, and which were made fairly and in accordance with the applicable statute and Rules. It is therefore respectfully submitted the petition should be in all things denied.

Respectfully submitted,

ROBERT EIKEL
EIKEL & GOLLER

APPENDIX A

COURT'S CHARGE TO THE JURY

(Reporter's Transcript, pp. 596-620)

THE COURT: Be seated, please.

Lady and gentlemen of the jury: you have heard all of the evidence in the case and the argument of counsel. It is now my duty to charge you upon the duties you are to perform as jurors in this case. You are the triers of the facts, and it is my duty to instruct you upon the law and by these instructions you are bound.

Most of this charge will be read from notes and books that I have before me, but I want you to consider that this is an oral charge and I ask that you pay close attention.

This case will be submitted to you under the provisions of Rule 49(a) of the Federal Rules of Civil Procedure. It is the prerogative of the Court to submit the case to the jury for a general verdict or for special verdicts upon interrogatories, and it is my considered judgment that this is a case which should be submitted upon interrogatories. I will submit to you written interrogatories susceptible of categorical or other brief answers, and I will give you such explanations and instructions concerning the matters thus submitted as may be necessary to enable you to make your findings upon each issue. I will submit to you for your verdicts the controlling controverted fact issues raised by the pleadings and the evidence. The interrogatories propounded to you are in writing and spaces are provided in which you will write your verdicts. You will take the written interrogatories and the

forms prepared for your verdicts with you to the jury room.

In considering and arriving at your verdict, you are instructed that the plaintiff, Lester Nehring, has the burden of proof in the case as to the interrogatories submitted; that is to say, the burden of going forward and establishing by a preponderance of the evidence the matters and facts upon which the plaintiff relies to establish his right to recover.

My statement about the burden of proof being upon the plaintiff, Lester Nehring, is true except for the last two interrogatories, they being interrogatories numbers Six and Seven. These interrogatories relate to the action of the defendant ship owner against the third party defendant, Strahan Shipping Company, and as to those two interrogatories the burden of proof is upon the third party plaintiff, the ship owner, by name Empresa Lineas Maritimas Argentinas.

By "preponderance of the evidence" is meant the greater weight and degree of credible evidence before you. It means that evidence which, considered in the light of all the facts and circumstances, you believe has the greater weight. It does not necessarily mean the greater number of witnesses.

You are the exclusive judges of the facts proved, of the credibility of the witnesses and the weight to be given to their testimony. In analyzing and considering and weighing and finally determining what are the true facts you have the right, and you alone have the right, to accept as true or reject as false, in whole or in part, the testimony of each and every witness who has appeared before you.

The analyzing and considering and weighing of the evidence presented to you in the trial of this case and the determining of your verdict in this case is your high duty and grave responsibility, not that of anyone except you twelve jurors to whom these interrogatories are submitted, not that of the Court or the lawyers or anyone else, just you twelve jurors alone.

Let me repeat that you are the exclusive judges of the facts proved and of the credibility of the witnesses and of the weight to be given to their testimony. You are entitled to weigh their evidence by any fair standard, that is to say, you are entitled to judge to what extent you believe or credit their evidence or testimony, including the exhibits. You are entitled to consider their appearance and their attitude, their demeanor on the witness stand and the way they looked when they testified. You are entitled to consider any interest the witness may have in the case.

By the term "negligence" as used in this charge is meant the failure to do that which a person of ordinary prudence in the exercise of ordinary care would do under the same or similar circumstances, or the doing of that which a person of ordinary prudence in the exercise of ordinary care would not do under the same or similar circumstances.

Since a corporation can act only through its officers or employees or other agents, the burden is upon the plaintiff to establish by a preponderance of the evidence in the case that the negligence of one or more officers or employees of the defendant was a proximate cause of any injury and consequent damage sustained by plaintiff. Any negligent act or omission of an officer or employee of a

corporation in the performance of his duties is held in law to be negligence of the corporation.

By the term "unseaworthy" is meant that the vessel or its appurtenances are or is not reasonably suited to the purpose for which it is intended. You are instructed that the existence of an unseaworthy condition in the vessel or its appurtenances does not make the ship owner liable for an accident unless the accident was actually caused by the unseaworthy condition. The mere existence of an unseaworthy condition does not impose liability.

The terms "negligence" and "unseaworthy" are different and should be distinguished from each other. By the term "negligence" as used in this charge is meant the failure to do that which a person of ordinary prudence in the exercise of ordinary care would do under the same or similar circumstances, or the doing of that which a person of ordinary prudence in the exercise of ordinary care would not do under the same or similar circumstances.

By the term "unseaworthy" is meant that the ship or some part thereof or the equipment or tools used to do the work aboard her is not reasonably fit for the purpose for which it is intended. A ship or her appurtenances may be unseaworthy without it being the fault of anyone, as negligence is not prerequisite of the determination of whether or not the vessel or its equipment is unseaworthy.

By the term "proximate cause" as used in this charge is meant that cause which, unbroken by any new and independent cause, produces an event and without which the event would not have occurred. To be a proximate cause of an event it should be reasonably anticipated and

foreseen by a person of ordinary prudence in the exercise of ordinary care that such event or some similar event would result from such cause as a natural and probable consequence.

By the term "new and independent cause", as used in the definition of proximate cause, is meant the act or omission of a separate or independent agency which destroys the causal connection between the negligent act or omission of the party charged therewith and the event complained of, and thereby becomes in itself the immediate cause of such event.

This does not mean that the law recognizes only one proximate cause of an injury consisting of only one factor or thing or the conduct of only one person. On the contrary, many factors or things or the conduct of two or more persons may operate at the same time, either independently or together, to cause an injury and in such a case each may be a proximate cause. It is the duty of the ship owner to furnish a seaworthy vessel and equipment and also to furnish its employees and others employed thereon with a reasonably safe place in which to work.

It is the duty of a longshoreman to exercise ordinary care for his own safety under the circumstances. The owner is not obligated to furnish an accident-free ship. The duty to furnish a seaworthy ship and the appurtenances is absolute, but it is the duty only to furnish a vessel and appurtenances reasonably fit for their intended use. The standard is not perfection, but reasonable fitness, not a ship that will weather every conceivable storm or stand every imaginable peril of the sea, but a vessel reasonably suited for the intended service.

The plaintiff in his suit against the ship owner is seeking to recover damages for personal injuries allegedly caused by an unseaworthy ship. Plaintiff's claim is based on two general grounds: one, of unseaworthiness; and, two, of negligence. Regarding the claim of unseaworthiness, you are instructed that the ship owner is under a non-delegable continuing duty to the plaintiff to furnish and to keep in order a seaworthy vessel, tackle, gear and appurtenances. This duty requires that the vessel and its tackle, gear and appurtenances be adequate and reasonably safe for the work being performed thereon.

The Court instructs you that the ship owner is liable to the plaintiff for injuries sustained by him caused or brought about by an unseaworthy condition, as hereinabove defined, even though the steamship company may not be found to be negligent. In other words, there is an absolute liability on the part of the owner or operator of a merchant vessel for injuries sustained by a longshoreman by reason of the unseaworthiness of the vessel or the failure to supply a reasonably safe place in which to work.

It was the continuing duty of the defendant ship owner at the time of the accident in question to use ordinary care under the circumstances in furnishing the plaintiff with reasonably safe equipment and a reasonably safe place in which to work aboard the ship and to use ordinary care under the circumstances to maintain and keep the place of work and the ship's equipment used in carrying on the work in a reasonably safe condition. This continuing duty to use ordinary care owed by the ship owner to the longshoreman aboard the ship exists independently of and separate from any similar duty owed to the longshoreman by others, including the stevedoring

company as their employer, and cannot be transferred or shifted by the ship owner to anyone else.

Unseaworthiness is a relative concept dependent in each instance upon circumstances in which the ship's fitness is drawn in question. A longshoreman does not assume the risk of injury from negligence of another or from unseaworthiness of the vessel. However, in nearly every occupation aboard ship there is some inherent and unavoidable risk which does not arise out of negligence or unseaworthiness.

There are in effect safety and health regulations of longshoring. These regulations have been promulgated by the United States Department of Labor. They specifically cover various things that characterize the stevedoring industry. The plaintiff claims that one of the regulations has been violated, and he is therefore entitled to have this taken into account by you in evaluating your decision on the merits of his suit.

In this connection I instruct you that the following portion of these regulations are deemed appropriate by the Court, and I now turn to Section 9.91(c), which reads: "Slippery conditions shall be eliminated as they occur."

It is the position of the defendant ship owner that these regulations cover the standard of care imposed on stevedoring companies, and in this connection the Court directs your attention to the following additional provisions, now turning to Section 9.2(a): The responsibility for compliance with the regulations of this part placed upon employees as defined in Section 9.3(c) of this part. (b) It is not the intent of the regulations of this part to place additional responsibilities or duties on owners,

operators, agents or masters of vessels unless such persons are acting as employers, nor is it the intent of these regulations to relieve such owners, operators, masters or agents of vessels of responsibilities or duties now placed upon them by the law, regulations or custom."

Contributory negligence is negligence of the plaintiff himself which caused or contributed to cause the accident causing his injuries. Contributory negligence is never assumed, it must be proved, and it is the burden in this case of the defendant to show by a preponderance of the evidence that the plaintiff was guilty of contributory negligence.

By the term "contributory negligence" is meant the negligence of the plaintiff himself which entered into and contributed to the accident causing his injury, that is, where the plaintiff himself failed to exercise that degree of care that an ordinarily prudent person acting under the same or similar circumstances would have exercised.

You are instructed that contributory negligence does not defeat the right of a longshoreman to recover damages for an injury he has suffered if his injury is proximately caused in part either by the unseaworthiness or by the negligence of the defendant or its employees.

In considering the defendant's claim that the plaintiff was guilty of contributory negligence, you will bear in mind that the plaintiff is not chargeable with any negligent conduct of his employer, the stevedoring company, or any of his fellow employees. The plaintiff is only chargeable with his own conduct, so in connection with the defendant's claim of contributory negligence you will consider only what the plaintiff himself did or failed to do at the time of and immediately before the accident.

If you find that the plaintiff, Lester Nehring, is entitled to recover damages but that his injury was also proximately caused in whole or in part by his own contributory negligence, then you will determine the extent to which his contributory negligence contributed to his injury and state the extent to which it contributed in terms of percentage in the space indicated on the answer sheet. In the event of such finding by you, you will not make any reduction in the amount of damages which you may find he has sustained, but you will simply find the amount of damages without regard to contributory negligence and then state the percentage to which such injury producing the damage was caused by his contributory negligence.

In arriving at and assessing the damages to which plaintiff is entitled, if any, you will award only such sum of money, if now paid in cash, as would fairly and reasonably compensate him for such damages as you find he has suffered as a direct and proximate result of the accident in question, taking into consideration the following elements of damage and none other:

(1) Such physical pain, if any, as you find from a preponderance of the evidence, plaintiff Nehring has suffered from the date of the occurrence of January 9, 1964, made the basis of this suit, to the date of this trial, directly and proximately caused by the injury suffered by him as a direct and proximate result of the occurrence of January 9, 1964, made the basis of this suit.

(2) Such mental anguish, if any, as you may find from a preponderance of the evidence he has suffered from the date of the occurrence of January 9, 1964, made the basis of this suit, to the date of this trial, directly and proximately caused by the injury suffered

by him as a direct and proximate result of the occurrence of January 9, 1964, made the basis of this suit.

(3) Such physical pain, if any, as you may find from a preponderance of the evidence he will in reasonable probability suffer in the future beyond this date, directly and proximately caused by the injury sustained by him as the direct and proximate result of the occurrence of January 9, 1964, made the basis of this suit.

(4) Such mental anguish, if any, as you may find from a preponderance of the evidence he will in reasonable probability suffer in the future beyond this date, directly and proximately caused by the injury sustained by him as the direct and proximate result of the occurrence of January 9, 1964, made the basis of this suit.

(5) The reasonable present cash value of such loss of earnings, if any, of the plaintiff Lester Nehring, as you may find from a preponderance of the evidence he has sustained since the date of the injury to the date of this trial, directly and proximately caused by the injury suffered by him as a direct and proximate result of the occurrence of January 9, 1964, made the basis of this suit.

(6) The reasonable cash value of loss, if any, of earning capacity of plaintiff as you may find from a preponderance of the evidence he will in reasonable probability sustain in the future beyond this date, directly and proximately caused by the injury suffered by him as the direct and proximate result of the occurrence of January 9, 1964, made the basis of this suit.

I will now read to you the interrogatories which are submitted to you for your verdicts. They are in writing

and spaces are provided in which you will write your answers. These interrogatories are numbered 1 through 7, but some of them contain subsections, so I believe if you answer all of the questions that are submitted there will be 17 questions in all to be answered by the jury.

I will now read them to you, omitting the caption.

Interrogatory No. 1: "Did the plaintiff, Lester Nehring, sustain an injury while working aboard the RIO BERMEJO on or about January 9, 1964?"

And you will answer the question "yes" or "no".

In each case there is a space provided in which you will write your answer.

"If you answer Interrogatory No. 1 in the negative, you need not answer any of the following interrogatories, but if you answer Interrogatory No. 1 in the affirmative, the following interrogatories will be answered.

"Interrogatory No. 2: (a) Was the RIO BERMEJO unseaworthy, as that term has been explained to you in the Court's charge, at the time of plaintiff's injury?"

You will answer "yes" or "no", as you find from the evidence.

Part (b): "If you have answered the foregoing interrogatory in the affirmative, was the unseaworthy condition of the RIO BERMEJO a proximate cause, in whole or in part, of the injury sustained by the plaintiff?"

You will answer the question "yes" or "no".

Interrogatory No. 3: "(a) Was the defendant ship owner, its master, agents, servants, or employees, negligent in any respect?"

You will answer "yes" or "no".

"(b) If you have answered the foregoing interrogatory in the affirmative, then state fully and in detail in what manner and respect it was negligent."

You will note there is a space left in which you will write your answer. If you find that you need additional space you may write on the back of the sheet or use another sheet of paper, as you wish.

Part (c): "If you have answered Interrogatory 3(a) in the affirmative, was such negligence, in whole or in part, a proximate cause of the injury sustained by plaintiff?"

You will answer "yes" or "no".

Interrogatory No. 4: "(a) Was the plaintiff, Lester Nehring, negligent in any respect?"

You will answer "yes" or "no".

"(b) If you have answered that he was negligent, then state fully and in detail in what manner and respect he was negligent."

Again, there is a space provided in which you will write your answer.

"(c) If you have answered that plaintiff was negligent, was his negligence, in whole or in part, a proximate cause of the injury sustained by him?"

You will answer "yes" or "no".

"(d) If you have answered the plaintiff was negligent and that his negligence was a proximate cause, in whole or in part, of the injury sustained by him, to what extent

did such negligence on the part of plaintiff cause or contribute to cause the accident in question?"

You will answer by stating the percentage.

Interrogatory No. 5: "What amount of money, if now paid in cash, will fairly and reasonably compensate the plaintiff, Lester Nehring, for the injury sustained by him on January 9, 1964?"

"You will answer by stating the amount in dollars and cents."

As I stated earlier, the next two interrogatories, numbers 6 and 7, relate to the controversy between the defendant Impresa Lineas Maritimas Argentinas, and the third party defendant Strahan Shipping Company, and as stated earlier the burden of proof to establish the affirmative of Interrogatory No. 6 and No. 7 is upon the defendant and third party plaintiff Empresa Lineas Maritimas Argentinas.

Interrogatory No. 6: "(a) Did the stevedoring company, Strahan Shipping Company, fail to perform its stevedoring work aboard the RIO BERMEJO in a reasonably safe and workmanlike manner?"

And you will answer "yes" or "no", as you so find.

"(b) If you have answered Interrogatory No. 6(a) in the negative, you need not answer the following interrogatories. If you have answered Interrogatory No. 6(a) in the affirmative, then state fully and in detail in what manner and respect the stevedoring company failed to do its work in a reasonably safe and workmanlike manner."

Again, there is a space provided in which you will write your answer.

"(c) If you have answered Interrogatory No. 6(a) in the affirmative, was such conduct a proximate cause of the injury sustained by plaintiff?"

You will answer the question "yes" or "no", as you so find.

Interrogatory No. 7: "(a) Was the defendant ship owner, its master, servants, agents or employees, guilty of conduct which would preclude the ship owner from recovering indemnity from the stevedoring company, Strahan Shipping Company?"

You will answer "yes" or "no", as you so find.

"(b) If you have answered Interrogatory No. 7(a) in the negative, you need not answer the following interrogatories. If you have answered Interrogatory No. 7(a) in the affirmative, then state fully and in detail in what manner and respect its conduct was sufficient to preclude indemnity."

Again there is a space provided in which you will write your answer.

And, finally, part (c): "If you have answered Interrogatory No. 7(a) in the affirmative, was such conduct a proximate cause of the injury sustained by plaintiff?"

You will answer "yes" or "no".

At the end is a line for the signature of the foreman of the jury and a date line for your verdicts to be dated.

Now, on the issues existing between the ship owner and the stevedoring company, you are charged that the ship owner owes a duty to longshoremen, but not to the stevedoring company, to furnish a seaworthy vessel and equip-

ment. It also owes the longshoremen the duty of providing a reasonably safe place in which to work.

The Court instructs you that Strahan Shipping Company was an independent stevedoring contractor, employed to discharge the cargo from the RIO BERMEJO. Under the law, the stevedore impliedly warrants that it will perform said service in a workmanlike manner, and the stevedoring contractor is liable to indemnify the ship owner for damages sustained as a result of the stevedore's breach of his warranty to perform the obligations of said contract with reasonable safety. This warranty of workmanlike service extends to the handling of cargo, as well as to the use of the vessel's equipment and working areas incident to the performance of the stevedoring work. The warranty is breached when the stevedoring contractor conducted its operations in a substandard manner, thereby bringing into play the vessel's unseaworthiness.

If the stevedoring contractor, through its employees, fails to exercise reasonable care in conducting its unloading operations and as a result thereof brings into play an unseaworthy condition of the vessel, for which the vessel is liable in damages to an injured longshoreman, the vessel owner is entitled to indemnity from the stevedoring contractor, because its negligence, which brings the unseaworthiness of the vessel into play, amounts to a breach of the warranty of workmanlike service owed by the stevedoring contractor to the vessel owner.

I have charged you that the ship owner is not a guarantor or an insurer of the safety of the longshoremen and that the extent of the ship owner's duty is only to exercise ordinary care under all of the circumstances.

Likewise, the stevedoring company is not a guarantor or an insurer of the safety of the longshoremen and the extent of the stevedoring company's duty to the ship owner is only to exercise reasonable care under all of the circumstances.

In answering Interrogatory No. 6, which asks whether the stevedoring company performed its work in a reasonably safe and workmanlike manner, you will consider only the duties owed by the stevedoring company to the steamship company and not consider for any purpose the duties owed by the stevedoring company to the plaintiff.

There is no duty on the part of the ship owner to give the stevedoring company notice of a danger which is obvious or of a danger which should have been obvious to a company exercising ordinary care under the circumstances. However, in the absence of appearances that caution it or would caution a reasonably prudent person under like circumstances, the stevedoring company was entitled to assume that its place of work aboard the ship and the stowed cargo was reasonably safe under all of the surrounding circumstances.

If you have answered parts (a), (b) and (c) of Interrogatory 6 in the affirmative, you will then answer Interrogatory No. 7. This interrogatory asks whether or not the ship owner was guilty of any conduct which would preclude the ship owner from recovering indemnity from the stevedoring company. That is, this question asks you whether or not the conduct of the ship owner is such that it should not be permitted to recover from the stevedoring company any sum which it may be obligated to pay the plaintiff Lester Nehring, in addition to its legal fees and expenses pertaining to the defense of Lester Nehring's action.

The burden of proving the ship owner was guilty of such conduct that it would not recover indemnity from the stevedoring company is on the stevedoring company.

The law provides that even though the stevedoring company may have failed to perform its work in a reasonably safe and workmanlike manner to some extent that the ship owner is not entitled to recover any amounts it might have to pay Lester Nehring from the stevedoring company if the ship owner is guilty of conduct of such a nature that it should not be permitted to recover from the stevedoring company.

By the term "conduct of such a nature that it should not be permitted to recover from the stevedoring company" is meant the failure to use that degree of care toward the stevedoring company which would be used by a ship owner of ordinary prudence under the same or similar circumstances. Here again the law uses as its yardstick the conduct of a reasonably prudent ship owner. That does not mean a ship owner that is unduly cautious or unduly careful; it does not mean a ship owner that is reckless; but it is this concept of the reasonably prudent ship owner which you must apply in measuring the conduct of the ship owner toward the stevedoring company in this case in answer to Interrogatory No. 7.

When you arrive at your answers to the questions submitted your verdicts will be signed by your foreman and dated. Your answer to each interrogatory must be unanimous, that is, all 12 members of the jury must agree in order to return any answer or verdict.

You are further instructed that all 12 members of the jury must be present during all of your sessions, discus-

sions and deliberations. If for any reason one or more of you should step out of the jury room all discussions and deliberations should cease until those members have returned and all 12 members of the jury are present.

When you retire to consider your verdicts, you will elect a foreman from among your number. It is my experience that anything that is done by more than one person requires that someone be in charge. Your foreman will be in charge and will preside over all of your sessions, discussions and deliberations, and will be your spokesman in court.

This concludes the charge of the Court in chief. It is provided by the Federal Rules of Civil Procedure that if any party wishes to except or object to the charge as given, or if any party wishes to request that additional charges be given, that any such exceptions, objections or requests may be made out of the presence and hearing of the jury.

I will now ask if there will be any such exceptions, objections or requests, and I will first recognize the plaintiff.

Mr. Roberts: Yes, Your Honor.

The Court: Very well. The jury will be withdrawn.

(Jury leaves the courtroom, and the following proceedings out of the presence and hearing of the jury.)

SUPPLEMENTAL CHARGE

(Reporter's Transcript, pp. 632, 633)

The Court: Very well. Your exception is noted.

Will you bring the jury in, please.

(Proceedings in the presence and hearing of the jury.)

The Court: Lady and gentlemen of the jury: I want to instruct you again, by way of clarification, that unseaworthiness and negligence are separate and independent concepts. You may find one and not the other. Either will support liability of the defendant to the plaintiff.

I instruct you that when you consider proximate cause in connection with unseaworthiness, foreseeability is not to be considered as an element of proximate cause.

The duty of the ship owner to furnish a seaworthy vessel is absolute and does not involve the duty to exercise ordinary care which relates to the negligence theory of recovery only. In other words, the concept of ordinary care does not relate to the unseaworthiness theory. It is to be considered only as an element of your consideration of the issue of negligence.

With those instructions, you may now retire to consider your verdicts. You will take with you the interrogatories with the forms prepared for your verdicts. You will also take with you all exhibits that have been admitted in evidence.

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IN THE

Supreme Court of the United States

October, 1968, Term

NO. 1311

LESTER NEHRING, *Petitioner*

v.

EMPRESA LINEAS MARITIMAS ARGENTINAS, ET AL, *Respondents*

v.

STRACHAN SHIPPING COMPANY, *Third Party Respondent*

RESPONDENTS' REPLY IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

I.

STATEMENT OF THE CASE

Once again the Plaintiff, this time as Petitioner before this Court, presses for a review of an adverse result obtained following a jury trial of an ordinary longshoreman's third party action against the vessel owner in which the stevedore was impleaded. Petitioner Nehring, an employee of Third Party Respondent, Strachan Shipping Company,

an independent contracting stevedoring company, alleged that he sustained injuries on January 9, 1964, while performing work as a longshoreman on board the S/S RIO BERMEJO owned and operated by Respondent, Empresa Lineas Maritimas Argentinas. The case was submitted to the jury upon special interrogatories pursuant to Rule 49(a) of the Federal Rules of Civil Procedure. The jury considered the first Interrogatory which inquired as to whether or not the Plaintiff had sustained an injury while working on board the S/S RIO BERMEJO on or about June 9, 1964, and the jury duly answered that Lester Nehring did not sustain an injury. In view of the jury's answer to the first interrogatory, it was unnecessary for the jury to consider or answer the remaining interrogatories. Final Judgment denying the claim of Petitioner, Lester Nehring, against the shipowner as well as the shipowner's claim against the stevedore was entered by the trial court. Petitioner appealed to the United States Court of Appeals for the Fifth Circuit where the judgment of the trial court was affirmed per curiam. A Petition for Rehearing before the Court of Appeals was also denied.

Petitioner urges no issue before this Court which has not been fully considered and disposed of below, nor does Petitioner raise any legal questions for this Court's determination. Indeed, the jury verdict in the case is readily explained by the fact that the jury did not believe the inconsistent accounts of the Plaintiff or his supporting witnesses as to what occurred. The record of the proceedings approximating 635 pages reflects the highly suspect nature of Plaintiff's contentions which caused the jury to waste no time in its deliberations in reaching and rendering a unanimous verdict within a space of 35 minutes.

II.

OPINIONS BELOW

There is no written District Court opinion. The per curiam opinion of the United States Court of Appeals for the Fifth Circuit affirming the trial court is reported in 401 F.2d 767 (5th Cir., 1968) and is set forth in Appendix A. The denial of the Petition for Rehearing was not published, but is set forth in Appendix B.

III.

QUESTIONS PRESENTED

The questions now raised by Petitioner which the lower courts have properly considered and decided adversely to the position of Petitioner are the following:

1) Can the Court be accused of abusing its judicial discretion pursuant to statute when it permitted the Defendant-shipowner and the Third Party Defendant-stevedore each to exercise three peremptory challenges and denied Plaintiff's Motion to Sever the Indemnity Action from the basic suit?

2) Can the Plaintiff, Lester Nehring, be heard to complain of an adverse jury verdict by attacking the Court's instructions to the jury when the context in which the term "sustained an injury" was considered by the jury after hearing all of the evidence was unqualifiedly clear from the record of the trial?

Respondents respectfully submit that the answer to both inquiries is no, that both the jury verdict in the District Court and its affirmance by the Court of Appeals were correct and that the Petition for Writ of Certiorari should summarily be denied.

The first question places Petitioner in the position of attacking the District Court's exercise of its discretion. Against a background of a trial in which the credibility of Petitioner's entire case was fatally undermined by the developments in the proof, Petitioner now seeks to blame the result on the trial judge for the manner in which he applied the applicable statute as to peremptory challenges in jury selection (28 U.S.C.A. §1870) and Rule 42(b) of the Federal Rules of Civil Procedure pertaining to separate trials. By their very language both are discretionary, and, as the Court of Appeals properly observed, there was no abuse of discretion.

The answer to the second question reveals the key to the outcome of the lawsuit. The theory of the defense was that there never was an accident or event or occurrence as and when alleged by Petitioner. Such theory was strengthened early in the case when Petitioner and certain of his supporting witnesses were exposed and divested of their credibility as they gave strikingly different accounts of the incident itself. Petitioner now seeks relief by leveling charges that the first and only Interrogatory answered by the jury was susceptible to confusion. As the Court of Appeals pointed out, "the argument (of Petitioner) is that the jury decided that there was 'no injury' without understanding what 'injury' meant." The jury understood perfectly well, but it could never generate any confidence in Plaintiff's case. The pattern of the course of the trial including the paramount inquiry consistently being made of the jury as to whether or not an accidental injury had taken place is readily seen from a brief reference to the record:

As to the opening remarks of counsel, the course of the evidence focused on one critical question for the jury to resolve—was there a "happening"? Was there an event?

Did an accidental injury take place? Did something occur to Plaintiff, either by slipping or falling? Petitioner's counsel in his opening statement indicated that "incidentally, he slipped, he fell, he injured himself while in this area because of these conditions" (R. 15). Counsel for Respondents asserted that "we deny that this man sustained an accident on this ship" (R. 18). It was also asserted by counsel for Respondents that "we, of course, deny that the Plaintiff is entitled to $250,000 or $250 for something that we say never happened" (R. 20, 21). The position was stressed that whatever disability Nehring had was related to other accidents and other injuries occurring prior to and subsequent to this alleged occurrence (R. 25).

As for the version of Petitioner and his witnesses concerning the accident itself, it was never a believable one. The only thing that Petitioner could "figure out" was that he slipped on the deck in loose bone meal and went down with the sack (R. 44). He conceded that he gave a statement a few days after the accident in which he stated that he was walking on some bags (R. 115) and that he did not report the accident for several days (R. 88-90). The testimony of the supporting witnesses leads to the unqualified conclusion that liberties were being taken with the truth (R. 139-140, 157-159, 187-188). A shadow was thereby cast over their credibility which was never removed. One had Petitioner walking on a tier of bags until he stepped on the midship coaming and slipped (R. 152); another had him walking some place, although the answer isn't clear (R. 173-174); another had the gang working on the floor or deck (R. 183). All three witnesses saw Petitioner as he was falling, but one said that Nehring fell backwards (R. 152), and another said that Nehring fell forward (R. 173). The cavalier respect for

the truth of these witnesses was not lost on the jury. Their testimony was simply unworthy of belief. The central theme which had already stood out as being the real issue for resolution by the jury was thus magnified many times. Did the accident actually happen or didn't it? This was what concerned the jury, and indeed it could not have been otherwise.

The arguments of counsel following the close of the evidence underscored the clarity with which the jury was caused to view the case. Counsel for Petitioner stated "now I say the first Interrogatory is whether or not Mr. Nehring was injured. I think the answer to that is yes". (R. 491). Counsel described again the work that was going on "when this occurred" (R. 492). Once more the theme was pursued by Petitioner's counsel in arguing that Petitioner "slipped and fell at the time" (R. 492). In striking contrast counsel for the Respondents emphasized the irreconcilable conflicts which placed Petitioner's case in serious jeopardy. These instances of obvious inconsistencies are capsuled in the record of the trial. (R. 526-529). Counsel for the Respondents summed up the case as he saw it when he stated that his convictions that the accident never happened had grown sounder as the evidence developed (R. 519). Counsel for Third Party Respondent also stressed the question as to whether or not Nehring sustained an injury on board the ship. (R. 550, 554-556). In rebuttal, counsel for Petitioner argued "now we go right down the line to the question of whether or not he got hurt on the job . . . what we are trying to do is find out what the facts are" (R. 589). Counsel then closed by stating "it is more likely true that Mr. Nehring was injured as he said he was when he said he was . . ." (R. 595).

Having heard the testimony and the arguments of counsel, the jury at last was called upon to perform its function in the light of the Court's charge. The flow of proof had not deviated to alter the crucial issue in the case, nor did the positions of the parties evidence any change. Call it an event, call it an accident, call it an injury, or call it an accidental injury, the jury in hearing this case had no opportunity to stray or become confused as to what constituted the key issue in the case. It is in this context that the Court's charge to the jury when tailored to the evidence leaves no doubt as to its correctness. The first Interrogatory upon which all succeeding interrogatories are conditioned is susceptible of no confusion. As the Court indicated, "if you answer Interrogatory No. 1 in the negative, you need not answer any of the following interrogatories." (R. 610). It is only if the jury had answered Interrogatory No. 1 affirmatively that the subsequent Interrogatories as to unseaworthiness, negligence, contributory negligence, percentage of Plaintiff's contributory negligence and finally damages broken down into six separate elements required consideration by the jury (R. 608-609).

The test of the Court's charge necessarily is whether or not on the particular record of the trial involved, the jury had full latitude to exercise its function and do what it wanted to do. There is no question but that the jury did exactly what it wanted to do in this case and that it did so with dispatch.

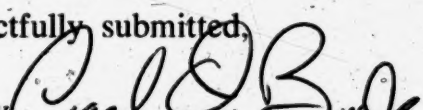
IV.

CONCLUSION

Respondents, Empresa Lineas Maritimas Argentinas, et al, respectfully submit that the Court of Appeals was correct in affirming the jury verdict rendered in the trial

court based upon a hearing of all the evidence and that such verdict was amply supported by the overwhelming evidence contained in the record. The result in this case turns in every material respect purely upon fact findings or the proper exercise of the discretion of the trial court pursuant to statute or rule. Certainly, none of the criteria listed in this Court's Rule 19 are remotely involved, nor would this Court's review of the record and opinion as to the facts it presents be of any value to pending or future litigation. There is no conflict with a decision of another Court of Appeals, nor is this decision in conflict with the Federal law or with applicable decisions of this Court. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

By 

CARL O. BUE, JR.
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Empresa Lineas Maritimas
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Of Counsel:

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V.

PROOF OF SERVICE

I, Carl O. Bue, Jr., attorney for Respondents being a member of the Bar of the Supreme Court of the United States, hereby certify that on this day I served copies of the foregoing Reply in Opposition to the Petition for Writ of Certiorari upon Mr. W. Jiles Roberts, Counsel for

Petitioner, by mailing three copies thereof postage prepaid addressed to his office in the Americana Building, Houston, Texas, 77002, and that I have also served copies upon Messrs, Eikel & Goller, Counsel for Third Party Respondent, by mailing three copies thereof postage prepaid, addressed to their offices, 205 Oil & Gas Building, Houston, Texas, 77002, dated this 23rd day of June, 1969.

Carl O. Bue, Jr.

CARL O. BUE, JR.

EXHIBIT A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

NO. 25,197

LESTER NEHRING,

Appellant,

versus

EMPRESA LINEAS MARITIMAS ARGENTINAS, ET AL,

Appellees.

Appeal from the United States District Court for the Southern District of Texas

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(October 7, 1968)

Before BELL and SIMPSON, Circuit Judges and ROBERTS, District Judge.

PER CURIAM: Appellant Nehring allegedly sustained injuries on January 9, 1964, while working as a longshoreman on the S/S RIO BERMEJO, owned and operated by Appellee Empresa Lineas Maritimas Ar-

gentinas. At the time of the alleged accident, appellant was an employee of Strachan Shipping Company, an independent contracting stevedoring company. Appellant brought suit against the shipowner for negligence and vessel unseaworthiness. The shipowner subsequently impleaded the stevedore employer on the theory that, if the ship was to be cast in liability which it denied, such resulting liability stemmed from the stevedore's breach of its warranty of workmanlike service owed to the vessel in the performance of its operations.

Prior to the commencement of the jury trial, appellant moved the trial court to equalize the peremptory challenges, i.e. to give the appellant the same total number of peremptory challenges that appellees were given. If not given equal challenges, appellant alternatively asked that the shipowner's third party action against the stevedore be severed. Appellant's motion was denied; appellant was given three peremptory challenges; and appellees were each allowed three challenges to be exercised without conferring and with no collusion between them. The appellant claims this was an abuse of the discretion given the trial court in 28 U.S.C. § 1870 (1964). There is no merit to this contention.

Following the presentation of the evidence and arguments, the court submitted the case to the jury upon special interrogatories. The first interrogatory read: "Did the plaintiff, Lester Nehring, sustain an injury while working aboard the RIO BERMEJO on or about January 9, 1964?" The jury answered "no" and obviously did not have to go further. Appellant's second contention on appeal is that the trial court erred in not defining, as requested, "injury" as an aggravation of a pre-existing con-

dition, for it was this type of injury about which appellant offered proof. The argument is that the jury decided there was "no injury" without understanding what "injury" meant.

This confuses the purpose of interrogatory number one, as a close reading of the record will reflect. The theory of the defense was that there was never any accident or event or occurrence as and when alleged by appellant: the shipowner's trial counsel said in his opening argument "We deny that this man sustained an accident on this ship." (R. 18). During the trial of the case, it was to prove or disprove the alleged accident that most of the evidence was offered; and this question was reemphasized during closing arguments of counsel, particularly by appellees. (R. 519). Thus, the crucial issue joined and argued in the trial below was whether or not there was an incident as alleged by appellant.

It was to present this issue to the jury that the trial judge submitted interrogatory number one. (R. 448); and to understand and answer it the jury needed no definition of injury. Extent or type of injury was not the inquiry. There being no need to define injury, this court finds that the jury was fairly instructed.

AFFIRMED.

EXHIBIT B

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

NO. 25197

LESTER NEHRING,

Appellant,

versus

EMPRESA LINEAS MARITIMAS ARGENTINAS, ET AL,

Appellees.

Appeal from the United States District Court for the Southern District of Texas

---

(December 5, 1968)

ON PETITION FOR REHEARING

Before BELL and SIMPSON, Circuit Judges and ROBERTS, District Judge.

PER CURIAM: It is ORDERED that the petition for rehearing in the above entitled and numbered cause be, and the same is, hereby DENIED.